PUBLIC PROSECUTOR

v.

GAN KEE TIAN

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[FT CRIMINAL TRIAL NO. 5 OF 1984]
14 JANUARY 1987

CRIMINAL LAW AND PROCEDURE: *Dangerous drugs - Trafficking - Dangerous Drugs Act 1952 - Section 39B(1) - Whether presumptions s. 37(d) satisfied - Evidence Act 1950 - Section 27 - Whether applicable.*

Inspector Saumi together with 6 other police personnel went to a coffee shop known as "Khong Look Yuen" at about 5.45 p.m. on 7 June 1983. The accused was arrested and he took Inspector Saumi to his room where a female Chinese, Tan Ah Keuu, was sleeping. Nothing incriminating was found in the room or on the accused's person.

Later, it was the police story that the accused led them to a toilet where he pushed the cover of the water cistern on the top of the lavatory and brought out two plastic packets containing 10 smaller packets of heroin.

The accused was charged with trafficking in dangerous drugs under s. 39B(1) of the Dangerous Drugs Act 1952.

Held:

[1] There was no credible evidence that the accused had custody or control of the dangerous drugs because:

(i) the evidence as to the questions asked by Inspector Saumi was contradictory;

(ii) a person's knowledge that "something incriminating" is concealed in a particular place coupled with his leading to its discovery does not amount to his having control over the incriminating thing in the context of s. 27 of the Evidence Act;

(iii) from the particular circumstances of the instant case, it is not justifiable, without more, to infer that the accused had control over the drug.

[2] There were grave doubts whether the accused pointed to the water cistern and retrieved the 2 bags and uttered the incriminating words.

[3] There were also doubts over the quality of the prosecution's evidence especially in relation to where the accused was arrested, the role of Tan Ah Keuu and the role and movement of the other police officers in the raid.

[4] Section 27 of the Evidence Act was inapplicable because the police did not discover heroin in the water cistern as a result of information distinctly supplied by the accused.

[Accused acquitted and discharged.]

Cases referred to:
Lau Kee Hoo v. PP [1984) 1 MLJ 110
Pulukuri Kotaya v. King Emperor LR 74 IA 65

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(d), (da) (i)
Evidence Act 1950, s. 27

For the public prosecutor - Ng Aik Guan, DPP
For the accused - Ramdas Tikamdas

JUDGMENT

KC Vohrah J:

The charge (amended by the prosecution just before its case was closed) against Gan Kee Tian reads as follows:

> That you on 7 June 1983 between 5.45 p.m. and 6.30 p.m. at No. 100A, Jalan Raja Laut, in the city of Kuala Lumpur, in the Federal Territory, did on your own behalf, traffic in a dangerous drug, to wit, 10 plastic packets containing a total of 18.31 grammes of Heroin in contravention of the provisions of paragraph (a) of Sub-section (1) of s. 39B of Dangerous Drugs Act 1952 (Revised Act 234/80), and that you have thereby committed an offence punishable under s. 39B(2) of the said act.

At the close of the case for the prosecution there is *prima facie* evidence that the subject matter of the charge which Gan is accused of trafficking in is heroin, a drug defined and listed as a dangerous drug in the First Schedule to the Dangerous Drugs Act 1952.

There is *prima facie* evidence that the heroin weighed 18.31 grammes. And it may be that Gan knew that the drug was a dangerous drug.

In respect, however, of the ingredients of "trafficking" in the context of its definition under s. 2 of the Act, no evidence has been adduced. But, of course, in the context of the presumptions under s. 37(d), if it can be established that a person had custody or control over anything containing dangerous drug, then possession of the drug in that person is presumed and it is also presumed that the person knew the nature of the drug. And then by virtue of these presumptions and by the fact that the weight of the substance is 15 grammes or more, the presumption of trafficking in that dangerous drug, if it is heroin, is raised under s. 37(da)(i) of the Act.

It is necessary, therefore, to see whether the prosecution has produced some evidence which is not inherently incredible establishing that Gan had either custody of or control over the heroin.

Inspector Saumi (PW1) testified that on information received he together with 6 other police personnel went to coffee shop "Khong Look Yuen" at about 5.45 p.m. on 7 June 1983. He saw the accused come out of the shop "head towards a staircase".

He arrested the accused and the accused then brought Inspector Saumi up the stairs to his room (which was one of 7 rooms) along a verandah on the first floor. On reaching the room Inspector Saumi pushed open the door and he found a female Chinese, Tan Ah Keuu, lying on a mattress. Inspector Saumi, DPC Asri and DPC Mohd. Noor (PW3) entered the room and a search was made. Nothing incriminating was found in the room or on the accused's person.

Inspector Saumi then interrogated the accused and the accused eventually gave reply but I ruled in the course of the trial that the answer made by the accused is inadmissible. I shall come back to my ruling later but suffice it to say, Inspector Saumi testified that "as a result of the replies, he (the accused) brought me to a toilet"

At the toilet Inspector Saumi said that he asked the accused, "Mana lu simpan itu dadah?" Inspector Saumi continued, "He kept quiet when we reached there. I questioned him further.

He kept quiet. Then he said something. He then **pushed** the cover of the water cistern on top of the lavatory. The accused put his hand into the cistern and I saw in his right hand two plastic packets."

The evidence is clear that these 2 plastic packets had 10 smaller packets which contained the heroin specified in the charge.

Inspector Saumi stood down from the witness stand for arguments on the admissibility of the statements under s. 27 of the Evidence Act 1950 to be made before me. After I had reserved my ruling he continued with his evidence and this is what he said in regard to what took place at the toilet,

> The accused took me and my other two personnel to the toilet. I asked, `Mana tempat lu simpan?' The accused kept silent. I asked the same question, `Mana tempat lu simpan?'

It will be noted that previously Inspector Saumi had stated that he had asked the question "Mana tempat lu simpan **itu dadah**?'. It will also be noted that DPC Mohd. Noor (PW3) who accompanied Inspector Saumi to the toilet reported one question only being asked, it being,

"Dimana tempat itu barang?"

He said the accused replied, "Sana dalam."

I have three versions, two from Inspector Saumi and one from DPC Mohd. Noor, as to what was asked by Inspector Saumi. Viewed in the context of what the accused said or did in response to the questioning made by Inspector Saumi, it is clearly important to know what the exact question was. If the accused had pointed to the cistern in response to the question "Mana lu simpan itu **dadah**?" it is possible to infer that the accused had kept some dangerous drug (dadah) in the water cistern.

On the other hand, if the question was "Mana tempat lu simpan?" the accused's pointing out of the water cistern may indicate the place where he had kept something. It is only the further act of the accused, if the evidence is to be believed, of taking out the heroin from the water cistern which may indicate that the accused had kept some dangerous drug there.

The third version, "Dimana tempat itu barang?" and the response "Sana dalam" and the act of the accused pointing to the water cistern and his retrieval of heroin from there indicate, at best, knowledge on the part of the accused of the drug but no more. There cannot be read from those circumstances that he kept the drug there, the evidence of one of the tenants on the floor, Sabri bin Hassan, PW7, being clear that all tenants on the floor used that toilet.

In the face of contradictory evidence as to the questions asked by Inspector Saumi I am unable, without more, to infer that the accused's conduct, according to Inspector Saumi and DPC Mohd. Noor, in his pointing to the water cistern and then his retrieving the heroin from the cistern, amounts to his having had custody of or control over the dangerous drug.

I am unable to agree with the learned Deputy Public Prosecutor that the Federal Court case of *Lau Kee Hoo v. PP* [1984] 1 MLJ 110 is authority for stating that a persons's knowledge that something incriminating is concealed in a particular place coupled with his leading to its discovery amounts to his having control over the incriminating thing in the context of s. 27. The facts of the case as appear at p. 111 of the report clearly show that when the appellant, Lau, was questioned by a police officer as to the whereabouts of some hand grenades, he replied that they were buried inside his smallholding and that he could lead the police to recover the grenades. He then led to the police to his smallholding. There he searched at two or three places. Then he took out a plastic container which contained grenades,

detonators and some documents. The Federal Court refused to disturb the finding of Zakaria J that the information given by Lau to the police witness and the discovery of the grenades established that the accused was in control of the grenades. The Federal Court had this to say,

> With regard to the ground under s. 27 of the Evidence Act, we would briefly say that in **the particular circumstances** of this case on the evidence of what **was said** and what **took place,** we are satisfied that the **appellant's knowledge** that the detonators and home-made grenades **were buried in his oil palm holding** amounts to control of them.

So far as the particular circumstances of the instant case are concerned, it is clear from the evidence of one of the tenants, as I have mentioned earlier, that all tenants on the floor where accused had his room used that toilet and no other toilet; it was not a toilet attached to the accused's room giving him sole access to the toilet. While one may read from his conduct when he pointed to the water cistern and when he retrieved the drug from the water cistern, if true, that he knew that the drug was there, it is not justifiable, without more, to infer that he therefore had control over the drug.

In setting out the facts in the earlier paragraphs showing that the accused pointed to the water cistern and that he retrieved the 2 plastic bags of heroin from the cistern I did not make a finding that these facts, *ex facie*, had been proved. In fact I have grave doubts whether indeed the accused pointed to the water cistern and that he retrieved the 2 bags. It will be noted that Inspector Saumi testified that after the accused had been questioned the second time in the toilet the accused then pointed out with both his handcuffed hands to the water cistern. Under cross-examination he said the accused was not then on the raised concrete where the toilet bowl was. He testified that the accused had said "Itu dalam." Inspector Saumi then instructed the accused, "You take the stuff!" He took off the handcuff from accused's right hand and he saw the accused **push** the top cover of the water cistern. DPC Mohd. Noor, however, said that when the accused was questioned by Saumi, the accused was already on the raised concrete. He said the accused pointed to the cistern and said, "Sana dalam." He then saw the accused **push** the water cistern cover and retrieve and bags of heroin from the cistern. When the sworn evidence of both witnesses are contrasted it is clear there are many discrepancies. When these discrepancies are viewed in the context of one particular aspect of the evidence of Mohd. Sabri (PW7), who lived on the floor where the raid was conducted, a disquieting inference can be made that the evidence of both witnesses in relation to what took place at the toilet is less than credible.

Mohd: Sabri had testified to the effect that the water cistern which was out of order since 1980 had a cover made of iron and the cover was placed on the cistern with its convex side within the confines of the cistern. He was shown a photograph (P2G) taken shortly after the raid which shows an object that looks like a lid on the water cistern. He said the condition of the water cistern in June 1983, the month when the raid was conducted, was as shown in the photograph. Mohd. Sabri said that the iron cover was very heavy. He had tried to shift it to see what was wrong with the cistern and had discovered that it was heavy. He had to lift it with one hand. The evidence of lnspector Saumi and DPC Mohd. Noor that the accused **pushed** the cover of the water cistern is therefore not believable; the cover was made of iron and was heavy, the evidence was that it could not be pushed, and clearly that must have been so as it was lying with its convex part within the cistern and one can surely infer that the upper surrounding edge of the water cistern would have constituted an effective restraint on the free movement of convex part of the cover. In the circumstances I find that I cannot accept the evidence of Inspector Saumi and DPC Mohd. Noor that the accused pushed the

cover and in the circumstances and in view of the discrepancies in their evidence of what had transpired at the toilet, I have grave doubts whether what they testified as to what the accused had said or had done in the toilet actually took place.

I would like to state that the quality of the prosecution's evidence especially in relation to where the accused was arrested and the role of the Chinese woman allegedly found in the accused's room, the role and movement of the other police officers in the raid, is far from satisfactory but I shall not delve into the matter in view of my finding that there is no evidence of control over or custody of the dangerous drugs by the accused.

There is however one other matter which I need to state now. I had ruled during the course of the trial that a statement allegedly made by the accused in his room to Inspector Saumi is in-admissible. Inspector Saumi had allegedly asked him, "Mana lu simpan itu dadah?" The accused remained silent. Then the witness repeated the same question and added "kasi tunjok sama saya." The accused allegedly replied , "Saya ada simpan itu barang tapi sikit juga." The witness concluded, "As a result of the replies, he brought me to the toilet." The question is, in the context of s. 27 of the Evidence Act 1950, did the information supplied by the accused distinctly relate to the discovery of the heroin in the water cistern? Did it immediately lead to the discovery of heroin concealed in the water cistern in the toilet?

In respect of the application of s. 27 of the Evidence Act 1950 it is worthwhile to fall back on what was said of the equivalent s. 27 in the Indian Evidence Act in the Privy Council case of *Pulukuri Kotaya v. King Emperor* LR 74 IA 65. I think it is worthwhile to reproduce what Sir Beaumont said *in extenso*. At p. 77 he said,

> Normally the section is brought into operation when a person in police custody produces from some place of concealment some object, such as a dead body, a weapon or ornaments, said to be connected with the crime of which the informant is accused. Mr. Megaw for the Crown, has argued that in such a case the "fact discovered" is the physical object produced, and that any information which relates distinctly to that object can be proved. On this view information given by a person that the body produced is that of a person murdered by him, that the weapon produced is the one used by him in the commission of a murder, or that the ornaments produced were stolen in a dacoity, would all be admissible. If this be the effect of s. 27, little substance would remain in the ban imposed by the two preceding sections on confessions made to the police, or by persons in police custody. That ban was presumably inspired by the fear of the legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. On normal principles of construction their Lordships think that the proviso to s. 26, added by s. 27, should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the `fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added `with which I stabbed A.', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant.

In the present case there is no indication within the statement where the dangerous drug was kept; it was merely a highly incriminating admission by the accused that he had or was keeping some dangerous drug; it did not distinctly relate to the discovery of the fact that heroin was concealed in the water cistern in the toilet to the accused's knowledge. It was sought to connect the accused's alleged admission with the alleged leading by the accused of the police party to the toilet and with his alleged subsequent conduct and statements in the toilet. To my mind there is no nexus contained within and between the alleged admission of the accused and the alleged conduct and statements. Having ruled the statement inadmissible I ignored the questions put by the witness to elicit that statement when I subsequently considered the rest of the evidence against the accused as they were not directly connected with such evidence.

Having viewed all the circumstances of the case I find that no *prima facie* case has been made out against the accused on the charge. I therefore acquit and discharge him.

Also found at [1987] 1 CLJ 403